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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 688

NOBLE C. POWELL,

Petitioner,

vs.

ROWLAND W. YOUNG,

Respondent

REPLY BRIEF OF PETITIONER

Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, the Supreme Court should grant certiorari to settle the conflict.

The purpose of this reply brief is to bring to the attention of this Court two decisions rendered by the United States Circuit Court of Appeals for the Seventh and Ninth Circuits, respectively, which have not heretofore been cited. Both of these cases are in conflict with the holding of the United States Circuit Court of Appeals for the Fifth Circuit in the present case upon an identical subject-matter. The cases are:

Sadler v. *Sadler,* 167 F. 2d. 1, (C. C. A. 9th, 1948);

De Korwin v. *First National Bank of Chicago,* 179 F. 2d 347 (C. C. A. 7th, 1949).

In the *Sadler* case, *supra*, plaintiff a citizen of California, brought suit in the District Court of Nevada against Edgar Sadler and the administratrix of the estate of Alfred Sadler, citizens of Nevada, seeking to have defendant declared trustee of certain real and personal property located in Nevada and for an accounting. Suit was dismissed as to the administratrix. The jurisdictional amount was admitted. Judgment was in favor of plaintiff. The defendant (appellant) contended that the Court was without jurisdiction because three of the heirs and the *legal representative* of two deceased heirs were not joined as parties. In disposing of this contention the Circuit Court of Appeals said:

> "We do not agree. The interests of the beneficiaries are not joint. That one or more beneficiaries may have a trust declared in his or their favor as well as in favor of persons not parties does not make the absent persons indispensable or even necessary parties. The complaint sought and the court found nothing adverse to them. Cf. Federal Rules of Civil Procedure, Rule 19, 28 U. S. C. A. following Section 723c; Atwood *v.* National Bank of Lima, 6 Cir., 115 F. 2d. 861, 863.
>
> "The quantum of the interest of the absent parties in the estate of the trust in their favor presents another question, as shown by the several cases cited by appellant. However, that question was reserved by court's judgment, no doubt until all the heirs are made parties or until compliance with Rule 19. Here the judgment was so framed that the interests of the absent beneficiaries are protected. Payne *v.* Hook, 7 Wall. 425, 431, 19 L. Ed. 260; Waterman *v.* Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 49, 30 S. Ct. 10, 54 L. Ed. 80."

The judgment was affirmed.

The District Court in the *Sadler* case, 73 F. Supp. 583, following the suggestion of this court in *Payne* v. *Hook*,

7 Wall. 425, 19 L. Ed. 260, retained jurisdiction of the action to hear, consider and determine applications on the part of beneficiaries other than the plaintiff to share in the trust property.

The District Court in the present case likewise followed the suggestion of this court in *Payne* v. *Hook, supra,* in ordering the respondent Young to account to and pay to the estate of Sarah Irvin Low, deceased, now pending in the Probate Court of Lowndes County, Alabama, the said sum of $44,000.00 for distribution in accordance with the provisions of the last will and testament of said decedent, and in divesting title to the land out of respondent Young and making the land a part of the estate to pass under the terms of the said will. The District Court retained jurisdiction over the cause until restitution of the $44,000.00 was made in conformity with the decree (R. pp. 486-488).

The decree of the District Court in the *Sadler* case and the decree of the District Court in the present case are identical in substance—both following the suggestion in *Payne* v. *Hook, supra.* The United States Circuit Court of Appeals for the Ninth Circuit affirmed the judgment in the *Sadler* case, (167 F. 2d 1) but the Circuit Court of Appeals for the Fifth Circuit reversed the judgment in the present case and dismissed the cause out of court (179 F. 2d 147).

There is a glaring conflict between the Ninth and Fifth Circuit Courts of Appeals upon an identical subject matter, which ought to be settled by this court.

The *De Korwin* v. *First National Bank of Chicago* case, *supra,* has a judicial history and in certain aspects is indistinguishable from the present case. The jurisdictional question was raised and disposed of in the first decision reported in 156 F. 2d 858. In the second case, 179 F. 2d 347, the question of indispensable parties, similar to the question in the present case, was raised and settled.

In the *De Korwin* case the plaintiff had an interest in the estate of a deceased beneficiary of a trust and claimed that under a proper interpretation of the trust instrument (a will) the estate had an interest in the trust because the deceased beneficiary had a vested interest. The other persons interested in the estate of the deceased beneficiary were not made parties (their presence would have destroyed diversity jurisdiction). There is, moreover, a particular similarity between the decree of the District Judge in the *De Korwin* case and the decree in the present case because the District Judge in the *De Korwin* case, after decreeing that the entire class of beneficiaries had vested interests and that the plaintiff, as heir of one deceased beneficiary, had a vested interest and was *entitled to an accounting*, decreed that the court retain jurisdiction, among other things

> "to fix the amount of proportional contributions to plaintiff's counsel out of their remainders from such heirs, legatees and devisees of Otto Young's grandchildren dying without issue before termination of the trust as may accept the benefit of services rendered by plaintiff's counsel in creating and preserving such interests, either by applying for or by receiving their share in the vested estates herein established."

The Court of Appeals for the Seventh Circuit affirmed the decree of the District Court, a part of which, as shown above, specifically extends the benefits to absent parties interested in the estate of the deceased beneficiary and is thus, in effect, like the decree in *Powell* v. *Young*, not merely a decree in favor of the plaintiff but a decree in favor of the estate.

There is, therefore, a glaring conflict between the Seventh and the Fifth Circuit Courts of Appeals upon an identical subject matter, which ought to be settled by this Court.

Conclusion

We respectfully submit that upon every principle of justice and equity petitioner had the right to bring this action against a co-legatee to determine the validity of the gifts made the basis of this action and to return the invalid gifts to the corpus of the estate to be distributed in accordance with the last will and testament of the deceased donor. The respondent could not be a debtor of this estate until a court of competent jurisdiction adjudged the gifts to be invalid.

As to the question of indispensable parties, the framework of the complaint revealed at the outset that no judgment or decree under the averments of the complaint could possibly be rendered that would, *in any way, affect any right, title or interest of the absent parties.* Hence, they could not be, and were not, indispensable parties.

The Judge of the Fifth Circuit Court of Appeals who wrote the decision in this case, in addition to failing to follow the principles announced by the decisions of this court and the decisions of other Circuits cited in the brief in support of the petition for certiorari and the decisions cited in this brief, failed to follow his own holding in the case of *Calcote* v. *Texas Pac. Coal & Oil Co.,* 157 F. 2d 216, wherein he said:

> *"The truth of the matter is that the classification of parties as necessary or indispensable depends entirely upon the particular facts of each case and that the same facts should produce the same holding.* Further, though some of the decisions exhibit more than a little confusion about it, it is undeniable that the error in non-joinder of parties, either necessary or indispensable, is not jurisdictional. *Finally, it is clearly settled that even if a party is indispensable, his absence from a suit will not be ground for dismissing it or*

reversing a judgment in it, if it clearly appears that no relief can be, or has been, obtained in the suit which injuriously affects his interest.'' (Emphasis supplied.)

The decisions of the Court of Appeals for the Fifth Circuit in the present case is in conflict with the principles of law announced by this Court in the cases cited in our original brief, and is in conflict with the holdings of other circuits cited in our original brief and also in this reply brief, and we urge this Court to grant certiorari and settle the conflict.

Respectfully submitted,

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